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From Sanford Levinson (ed.), *Torture*

THE PROHIBITION ON TORTURE AND THE LIMITS OF THE LAW

Oren Gross[*]

I. INTRODUCTION

The debate about the moral and legal nature of the prohibition on torture and about the permissibility of carving out exceptions to that ban is generally conceptualized as a clash between two opposing poles with no middle ground between them. One may support an absolute ban on torture, a ban that is non-derogable whatever the circumstances, a ban that applies in times of peace as well as in times of great calamity. Alternatively, one may believe that the duty not to torture, even if generally desirable and laudable, does not apply in certain exceptional circumstances, or, even if it does apply, is overridden, canceled or trumped by competing values.

Absolutists—those who believe that an unconditional ban on torture ought to apply without exception regardless of circumstances—frequently base their position on deontological grounds. For them, torture is inherently wrong. It is an evil that can never be justified or excused. It violates the physical and mental integrity of the person subjected to it, and negates her autonomy and humanity and deprives her of human dignity. It reduces her to a mere object, a body, from which information is to be extracted, while coercing her to act in a manner that may be contrary to her most fundamental beliefs, values, and interests.[1] Torture is also wrong because of its depraving and corrupting effects on individual torturers as well as on

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* Associate Professor and Vance K. Opperman Research Scholar, University of Minnesota Law School. Some of the issues discussed in this chapter are developed further in Oren Gross, *Is Torture Warrant Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. (forthcoming 2004).

[1] A classic discussion is ELAINE SCARRY, THE BODY IN PAIN 27-59 (1985).

society at large. Hence, under no circumstances should such actions be morally acceptable or legally allowed. Others support an absolutist view of the ban on torture by marshaling rule-consequentialist arguments. They claim that the social costs of permitting the use of torture, even in narrowly defined exceptional circumstances (assuming, of course, that those exceptional circumstances lend themselves to such narrowly tailored definitions), would always outweigh the social benefits that could be derived from applying torture. Hence, there can be no point in any act of balancing on a case by case basis with respect to the question of torture, since a correctly calibrated cost-benefit analysis must always, *ab definitio*, lead to the same conclusion, i.e., that torture should not be allowed regardless of any specific context. Any analysis that leads to a contrary conclusion is based on miscalculation which is the result of distorted focus on isolated cases while ignoring long-term and systemic implications of particular courses of action.

In its purest form, the absolutist point of view does not accept the permissibility or the usefulness of talking about the possibility of using torture in exceptional circumstances or of discussing moral and legal dilemmas that are invoked by such cases as the 'ticking bomb' scenario.[2] Indeed, even attempting to conduct a rational conversation about torture may be deemed wrong as it can undermine the commitment to a general absolute prohibition. Torture is impermissible and that is all there is to it.

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[2] The basic features of the paradigmatic ticking bomb case are well known: The police have in custody a person who they are absolutely certain has planted a massive bomb somewhere in a bustling shopping mall. The bomb may go off at any moment, and there is not enough time to evacuate the place. Should the bomb go off, thousands of people will die. The only lead that the police have to locate the bomb is the person in custody, but she will not reveal the location of the bomb. Police investigators are certain, beyond any doubt, that the only way of getting the information from her is by torturing her. They are also confident that if torture is applied the suspect will divulge correct information about the

It is easy to see why this uncompromising point of view is castigated by its opponents as utopian, naïve or even outright hypocritical. The case of the ticking bomb is used by those who advocate the position that use of coercive interrogation methods may be justified in certain—albeit exceptional and extraordinary—circumstances. Under this position, which can be termed the "conditional ban" approach, there seems to be no place for a comprehensive, absolute, *a priori* prohibition on the use of torture.

The most prevalent arguments in support of the conditionality of the prohibition on torture are act-consequentialist claims comparing costs and benefits on a case-by-case basis. Such a calculus may lead to the conclusion that, at least in some cases, the social benefits of torture exceed the social costs that attach to such practices.[3] Aside from the (important) question of what constitute good and bad consequences, people who are willing to engage in this sort of act-consequentialism are often charged with being biased towards immediate consequences while discounting (or ignoring entirely) long-term consequences of the use of torture as well as with treating the use of torture, in and of itself, as morally neutral, since all that really matters are the results. These failings, combined with the fact that it is easier to justify the use of torture when engaging in any act of balancing (i.e., in the absence of an absolute prohibition on torture),[4] result in too much, rather than too little, torture.

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location of the bomb, thus giving the bomb squad a better chance of disarming it in time.

[3] *See, e.g.*, W.L. Twining and P.E. Twining, *Bentham on Torture*, 24 NORTHERN IRELAND LEGAL Q. 305 (1973).

[4] *See, e.g.*, Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S MAGAZINE 63, 66 (Feb. 1961), *reprinted in* CHARLES BLACK, THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW 89 (1963) ("As a matter of attitude, the language of 'balancing' is apt language, easily conformable language, for the job of cutting down to what somebody thinks is comfortable size the claims to a sometimes awkward human freedom which the Bill of Rights set out to protect.").

One attempt to escape both sets of criticisms calls for the use of what Charles Black coined "orders of magnitude" assessment. Thus, even if a straightforward cost-benefit analysis leads to the conclusion that, in a given case, the benefits from use of torture outweigh the costs involved, torture is not to be used unless the magnitude of the threat to society (which may be prevented or minimized as a result of resorting to torture) is of a particularly large scale (e.g., the "nuclear weapon in a suitcase in the middle of a major metropolis" scenario). Under this approach, the prohibition on torture sets out a strong presumption against the use of torture. That presumption is, however, rebuttable. Yet, to refute it in any given case a showing must be made of the exceptional magnitude of the risk involved. Only in such extreme cases may the fundamental presumption against the use of torture be refuted. In all other cases, torture is banned.[5]

A third set of arguments put forward by the conditionalists suggests that the prohibition on torture cannot be defensible as a moral absolute. The prohibition on torture, it is conceded, is an important and fundamental principle, but it is not the only value in play in extreme circumstances. Thus, for example, when the choice is between the physical integrity and dignity of a suspected terrorist, on the one hand, and the lives of a great many innocent persons (e.g., those who are highly likely to be killed or be seriously injured should the ticking bomb actually go off), on the other hand, an absolute ban on torture cannot be morally defensible.[6] Indeed, the

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[5] *Id*. at 67-68. It is worth noting that this "orders of magnitude" approach may also be shared by some who arrive at similar conclusion from a deontological, rather than consequentialist, perspective. *See, e.g.*, Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280 (1989). *See also* THOMAS NAGEL, MORTAL QUESTIONS 56 (1979) ("while it seems to me certainly right to adhere to absolutist restrictions unless the utilitarian considerations favoring violation are overpoweringly weighty and extremely certain—nevertheless, when that special condition is met, it may become impossible to adhere to an absolutist position.").

[6] *See, e.g.*, Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 (2000);

fact that all but unabashed Kantians recognize the difficulties presented by extreme cases to any absolutist position is taken as further evidence that an absolutist position with respect to the ban on torture is untenable.

Interestingly enough, most absolutists and conditionalists share at least one common, if unstated, theme. While the former regard such scenarios as the ticking bomb case as irrelevant, the latter often focus precisely on those cases and deny the moral or legal validity of any claim to absolutism of the general prohibition on torture. Here is my first point of departure from either perspective.

In this paper, I defend an absolute prohibition on torture while, at the same time, arguing that the ticking-bomb case should not be brushed aside as merely hypothetical or as either morally or legally irrelevant. I suggest that the way to deal with what may be called the "extreme" or "catastrophic" case is neither by reading it out of the equation nor by using it as the center-piece for establishing general policies. Rather, the proposal made below focuses on the possibility that truly exceptional cases may give rise to official disobedience: public officials may step outside the legal framework, that is act extralegally, and be ready to accept the legal ramifications of their actions. However, there is also the possibility that the extralegal actions undertaken by those officials will be legally (if not morally) excused ex post. I argue that the prospect of extralegal action supports and strengthens the possibility of formulating (and maintaining) an absolute prohibition on torture.

My focus is on what I call *preventive interrogational torture*. Henry Shue identified interrogational torture as torture whose aim is gaining information.[7] By adding "preventive" I seek to limit the discussion to that

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Leon Sheleff, *The Necessity of Defense of the Truth: On the Tortuous Deliberations About the Use of Torture*, 17 BAR-ILAN L. STUD. 459, 485-88 (2002); ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 131-63 (2002).

[7] Henry Shue, *Torture*, 7 PHILOSOPHY & PUB. AFF. 124, 133 (1978).

use of torture whose aim is to gain information that would assist the authorities in foiling exceptionally grave future terrorist attacks. Hence, the aim is entirely forward-looking. Preventive interrogational torture is not concerned with, for example, obtaining confessions or other evidence which may be used to bring the subject of interrogation to criminal trial. Nor is it concerned with punishing individuals for past actions.

A second clarification concerns the scope of the term "torture." Much of the legal discussion about torture revolves around the decision as to what precisely constitutes "torture." Thus, for example, the jurisprudence developed under the European Convention on Human Rights has tended to tackle the issue through the prism of a "severity of suffering" test. According to this test, a distinction can be drawn among various categories of ill-treatment (e.g., ill-treatment that amounts to "degrading" or "inhuman" treatment or to "torture") as well as between ill-treatment and treatment that does not cross the threshold of suffering which would render such treatment impermissible.[8] The "severity of suffering" test has been invoked by governments arguing that interrogation techniques utilized by their agents, while rough and coercive, did not cause so much suffering as to brand the interrogators' conduct "ill-treatment." Thus, the threshold test of suffering has been used in an attempt to fly below the radar of the absolute prohibition on torture. I am not interested in such definitional wizardry, which avoids hard questions by attempting to convince us that there is no fundamental dilemma that ought to be addressed. Rather, the argument developed below seeks to address instances where interrogation methods, which clearly fall within the ambit of "torture," are used. The case of the preventive interrogational torture is truly complex. We are not served well

[8] *See, e.g.*, MALCOLM D. EVANS & ROD MORGAN, PREVENTING TORTURE 73-79 (1998); Yutaka Arai-Yokoi, *Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR*, 21 NETHERLANDS Q. HUM. RTS. 385 (2003).

by attempting to pretend that it is a much simpler case of definitional juggling.

II. THE CASE FOR AN ABSOLUTE PROHIBITION ON TORTURE

Torture is absolutely prohibited under all the major international human rights and humanitarian law conventions. This non-derogable, absolute ban also forms part of customary international law and, arguably, amounts to a preemptory norm of international law.[9] No country around the world admits to the use of torture by its agents or openly challenges the absolute nature of the prohibition. Indeed, most governments proudly point out to specific provisions in their respective national constitutions and penal codes that prohibit torture and attach criminal sanctions to acts amounting to torture.

The case for an absolute prohibition on interrogational torture seems to me to be a compelling one. However, I do not believe that the case for an absolute ban can be made solely within the four walls of what Michael Moore called "the absolutist view of morality."[10] While non-consequentialist reasoning supports a *ban* on torture, it does not, in and of itself, present a compelling case for an *absolute* ban. To arrive at the conclusion that absolute prohibition on torture is justified more is needed. I anchor that necessary addition in pragmatic reasoning.

Taken from a purely Kantian perspective, the ban on torture is considered to be an unconditional duty under all circumstances. For this statement to hold true, we must conclude that the ban on torture trumps all competing

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9 *See, e.g.*, Roland Bank, *International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?*, 8 EUR. J. INT'L L. 613 (1997); Restatement (Third) of the Foreign Relations Law of the United States, §702, cmt. n (1990). *See also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992); Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

10 Moore, *supra* note 5, at 297-98.

values including, for example, the right to life (e.g., we may not torture even when this is necessary to save the lives of innocent individuals). Moral absolutists must maintain their support for the absolute ban on torture even when the outcome of abstaining from use of torture in any given case is truly catastrophic, indeed, even if the survival of the whole world is at stake. *Fiat justitia et pereat mundus*. This may be the case, for example, when the particular ticking bomb is a nuclear device whose activation may result in the killing of millions of innocent people. The question whether such a scenario is at all likely, while bearing considerable weight when assessing the pragmatic reasons for an absolute ban on torture, is of little significance when discussing the moral basis for such a ban. To be a true moral absolutist one must support a ban on torture no matter what, i.e., no matter how likely the harm and no matter how great the magnitude of that harm. In real life, however, even those who believe that saving the life of one (or more) innocent individuals may not justify or excuse torture of suspected terrorists, are hard pressed to uphold that position in cases where there is a real risk the a harm of catastrophic proportions will materialize. As demonstrated below, many who support absolute, categorical rights and (where relevant) prohibitions, realize that their position is untenable, not only practically but also morally speaking, when applied to such catastrophic cases.

Yet, whether one accepts that there can be no circumstances under which use of torture may be morally justified or excused or subscribes to the view that there are situations in which resort to torture may be defensible, supporting an absolute *legal* ban on torture makes sense. For the former, the prescription of an absolute prohibition on torture poses no difficulty and requires no further explanation. Yet even those who advocate the latter position ought to support an absolute legal ban on preventive

interrogational torture. This position is supported by numerous arguments and I will briefly note some of the more salient ones.

1. *Setting general policy, accommodating exceptional cases*. While ticking bomb scenarios are not merely hypothetical cases conjured up in an academic ivory tower, they are extremely rare in practice. When we set out to chart a general policy on the issue of torture we must ask ourselves whether our general policy ought to be shaped around the contours of these rare exceptions. Or is there an independent value in striking a strong position in favor of an absolute ban on torture? Those who believe, as I do, that the ticking bomb case is a hard one from both ethical and legal perspectives, must be mindful of the risk of creating bad law (and ethics) to answer to the particular needs of the hard case.

However, we must also be careful not to go to the other extreme. Henry Shue warns that "artificial cases make bad ethics."[11] This is certainly an attractive proposition. Yet its problem lies in the fact that ticking bomb cases are not "artificial." They are real albeit rare. Ignoring them completely, by rhetorically relegating them to the level of "artificial," is utopian or naïve, at best. There is a difference between ignoring completely the truly catastrophic cases and focusing our attention elsewhere when designing general rules and policies. We can address the real conundrums presented by such cases in other ways.

2. *Symbolism, myths, and education*. A categorical prohibition on the use of torture is also desirable in order to uphold the symbolism of human dignity and the inviolability of the human body. Such a prohibition not only approximates what decent people believe, but also what society we want to live in and belong to.[12] Moreover, even if one believes that an absolute ban on torture is unrealistic, as a practical matter, there is independent value in upholding the myth that torture is absolutely prohibited. Such a position

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[11] Shue, *supra* note 7, at 141.
[12] Black, *supra* note 4, at 67.

may serve as an obvious notice that fundamental rights and values are not forsaken, whatever the circumstances, and that cries of national security, emergency and catastrophe do not trump fundamental individual rights and liberties. In fact, the more entrenched a norm is—and the prohibition on torture is among the most entrenched ones—the harder it will be for government to convince the public that violating that norm is necessary.

An absolute prohibition on torture plays a significant educational function. It attaches special (moral, political, social, and legal) condemnation to torture as abhorrent. Furthermore, in addition to complying with a nation's obligations under international law, upholding a non-derogable ban on torture sends a clear and strong message to other countries around the world about the impermissibility of such practices.[13]

3. *Strategy of resistance*. It may well be that use of preventive interrogational torture under certain extreme circumstances is inevitable. If government agents perceive such use to be the only way to procure critical information which is deemed necessary to foil an imminent massive terrorist attack that would result in thousands of casualties, they are likely to resort to such measures, whether they are legally permissible or not. However, even when we acknowledge that inevitability, it still makes good sense to say an absolute 'no' to the use of torture. As Fred Schauer argues, "Resisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous."[14] What is "less inevitable but more dangerous" is, for example, the expanded use of interrogational torture to less-than-catastrophic cases. Once we authorize state agents to use interrogational torture in one set of cases, it is unlikely that we will be able to

[13] John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 763 (2002).

[14] Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1085 (1986).

contain such use to that limited subset of cases. Rather, such powers and authority are likely to expand far beyond their original intended use. Moreover, the insistence on an absolute ban on torture may slow down the rush to resort to torture practices even in truly exceptional cases. Such an absolutist position not only imposes moral inhibitions on government officials, but also raises the specter of public exposure if a measure is later considered to have been unnecessary, and the (albeit remote) possibility of criminal proceedings and civil suits brought against the perpetrators.

4. *Rejection of balancing tests*. An absolute ban on torture rejects the legitimacy of pursuing any form of balancing in particular cases between the ban on torture and competing values. As noted above, such balancing act is going to be factually difficult to conduct and subject to inherent biases that would result in more, rather than less, torture.

5. *Slippery slopes*. Slippery slope arguments constitute a significant part of the absolutists' arsenal. They come in the form of "if X then Y; Y is bad; Therefore even if X is good, we must refrain from X because of Y." X, in this case, is allowing the use of preventive interrogational torture in truly exceptional cases. The feared Ys include, for example: (1) use of interrogation torture for non-preventive purposes (including for purposes of retribution and early punishment); (2) use of interrogational torture in less-than-truly-exceptional cases; and- (3) expansion of the use of interrogational torture beyond the particular confines of anti-terrorism, such as applying similar methods to "ordinary" criminals. This may be the result of the fact that use of torture creates a certain mindset among interrogators as well as a broad-based constituency for torture.

In sum, the only realistic barrier against governmental abuse of powers in the context of interrogational torture may be the setting of an absolute prohibition on such practices. Even if there is a cost to be paid by such a prohibition preventing what may be deemed as necessary action in

ticking bomb situations, such cost is small due to the infinitesimal probability of such cases arising (and government not being able to effectively deal with them once they arise by utilizing legitimate measures short of torture) and it is negligible in comparison with the greater costs entailed in abuse of powers by the government in a broader—and arguably more realistic—set of cases.

III. CATASTROPHIC CASES

Most absolutists end the discussion about the permissibility of interrogational torture at this point. However, the debate about torture persists. As Evans and Morgan note "[j]ust beneath the surface … there is clearly a view, prevalent in many jurisdictions among security and police personnel, that torture, or means of physical or psychological pressure that we may term *near-torture*, may have to be resorted to in certain circumstances."[15] The terrorist attacks of September 11 and the on-going war on terrorism rekindled a public and intellectual debate on the permissibility of torture and have demonstrated that the view identified in the excerpt above is shared by many segments of the population beyond "security and police personnel."

To deny the use of preventive interrogational torture even when, for example, there is good reason to believe that a massive bomb is ticking in a mall may be thought to be, by many persons, as cold hearted as it is to permit torture in the first place. It is cold hearted because in true catastrophic cases the failure to use preventive interrogational torture will result in the death of many innocent people. Upholding the rights of the suspected terrorist will lead to the negation of the rights, including the very fundamental right to life, of innocent victims. As Sissela Bok observes, "it is a

[15] EVANS & MORGAN, *supra* note 8, at 54.

very narrow view of responsibility which does not also take some blame for a disaster one could easily have averted, no matter how much others are also to blame."[16] To deny the use of preventive interrogational torture in such cases, as the Landau Commission in Israel suggested,[17] is also hypocritical: as experience tells us, when faced with serious threats to the life of the nation, government will take whatever measures it deems necessary to abate the crisis. As Justice Ben-Porat of the Israeli Supreme Court wrote in her opinion in *Barzilai v. Government of Israel*:

> [W]e, as judges who "dwell among our people," should not harbor any illusions . . . . There simply are cases in which those who are at the helm of the State, and bear responsibility for its survival and security, regard certain deviations from the law for the sake of protecting the security of the State, as an unavoidable necessity.[18]

Ignoring those real-life consequences of the ticking bomb case may result in portrayal of the legal system as unrealistic and inadequate. As a result, particular norms, and perhaps the legal system in general, may break down, as the ethos of obedience to law may be seriously shaken and challenges emerge with respect to the reasonableness of following these norms. Thus, legal rigidity in the face of severe crises is not merely hypocritical, but is, in fact, detrimental to long-term notions of the rule of law. It may also lead to more, rather than less, radical interference with individual

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[16] SISSELA BOK, LYING 41-42 (2d ed. 1999).

[17] Israeli Gov't Press Office, Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (1987), *reprinted in* 23 ISR. L. REV. 146, 183 (1989).

[18] H.C. 428, 429, 431, 446, 448, 463/86, Barzilai v. Gov't of Israel, 40(3) P.D. 505, *reprinted in* 6 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (1988), at 63. *See also* Pnina Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture*, 10 CARDOZO L. REV. 529, 547-56 (1988); Mordechai Kremnitzer, *The Case of the Security Services Pardon*, 12 IYUNEI MISHPAT 595 (1987).

rights and liberties.[19] A conditional ban on torture imposes high social and individual costs, but so too does an absolute ban.

Supporting an uncompromising absolute prohibition on torture amounts to setting unrealistic standards; standards that no one can hope to meet when faced with a truly catastrophic case. As the drafters of the Model Penal Code explain: "[l]aw is ineffective in the deepest sense, indeed . . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise."[20]

Even if each of us, as moral agents, would be supportive of an absolute prohibition on torture, we would still not want those who are entrusted with keeping us safe from harm to be strictly bound by similar constraints. We want our leaders and our public officials to possess the highest moral character. But I do not believe we want them to be brazen Kantians. Recall Kant's celebrated example of an unconditional duty, i.e., the duty to tell the truth. According to Kant, the duty to tell the truth is not suspended even when an assassin (A) asks a person (B) whether a friend of B, who A wishes to murder, is hiding in B's house. I agree with Sissela Bok that: "A world where it is improper even to tell a lie to a murderer pursuing an innocent victim is not a world that many would find safe to inhabit."[21] Very few people would want to have as a friend someone who tells the assassin the truth rather than lie and save her friend. Similarly, few would want a

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[19] *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. (forthcoming 2004) ("If respect for civil liberties requires governmental paralysis, serious politicians will not hesitate before sacrificing rights to the war against terrorism. They will only gain popular applause by brushing civil libertarian objections aside as quixotic.").

[20] 1 MODEL PENAL CODE AND COMMENTARIES, § 2.09 at 372-75 (1985) , *quoted in* Yale Kamisar, *Physician Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121, 1143 (1998).

leader who follows Kant's absolutist view to its extreme rather than act to save the lives of innocent civilians. As Judge Posner aptly put it "if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."[22] Michael Walzer suggested that a moral politician is recognized by "his dirty hands."[23] Faced with a ticking bomb scenario, a moral person who is not a political leader, i.e., who does not bear the burden of actual decision-making, would refuse to act in an immoral way and embrace an absolutist perspective. She would keep her hands clean. A public official who is immoral would merely pretend that her hands were clean (e.g., by resorting to interrogational torture but lying about it and denying the use of torture). A moral official would do the right thing to save innocent lives, while openly acknowledging and recognizing that such actions are (morally) wrong—that is, openly admitting that her hands are indeed dirty. The question then becomes not whether state agents will use preventive interrogational torture in the face of a moral principle to the contrary (they will), but rather what moral judgment and legal effect should be attached to such action.

Thus, the catastrophic case presents the open-minded absolutist with a real dilemma. Many have sought to resolve that dilemma by conceding that the catastrophic case calls for a special, exceptional treatment.[24] The nature of such exceptional treatment may be the subject of further debate, for example, as to whether it calls for the suspension or qualification of otherwise applicable moral norms (we may then talk about a justification) or do such general moral norms continue to apply even to the exceptional case

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[21] BOK, *supra* note 16, at 42.

[22] Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28.

[23] Michael Walzer, *Political Action: The Problem of Dirty Hands*, reprinted in this volume at pp. [**xxx**].

[24] See Sanford Levinson's contribution to this volume, discussing the response of Charles Fried to the problem of "catastrophe." *See also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1119-20 (2003).

which is still recognized as creating exceptional circumstances (when we may talk about excuses). Yet, the important point is recognizing the need to engage in such further debate, that is acknowledging the relevance and significance of the catastrophic case.

From a legal perspective, the argument about the catastrophic case implicitly acknowledges that legal norms presuppose the existence of a "normal" state of affairs and remain applicable as long as this state of affairs continues to exist. Accordingly, "[t]his effective normal situation is not a mere 'superficial presupposition' that a jurist can ignore; that situation belongs precisely to [the norm's] immanent validity."[25] In the catastrophic case, when this underlying normal state of affairs is fundamentally interrupted, the relevant legal norm may no longer be applicable as is and cannot fulfill its ordinary regulatory function. "For a legal order to make sense, a normal situation must exist . . . ."[26] General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails. Catastrophes undermine this factual basis.

Thus, extreme cases present us with a truly tragic choice. Any attempt to relegate the extreme case to mere irrelevance does not make the choice less tragic, nor does it make a real problem "go away." We can only hope to arrive at a meaningful solution to the legal and moral dilemmas presented to us by the catastrophic case by acknowledging, and accounting for, all the relevant values and interests.

The discussion above still leaves us with the question of what constitutes a truly "catastrophic case." I will attempt to answer this question, which clearly is significant to the overall tenability of my project, on a different occasion. For now, it is sufficient to acknowledge that *some*

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[25] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 13 (George Schwab trans., MIT Press 1985) (1922).

[26] *Id*.

catastrophic case is possible. The task of this chapter is to set out an argument for the *plausibility* of a solution based on pragmatic absolutism and official disobedience, rather than attempt to define more clearly the precise contours of such proposal.

IV. OFFICIAL DISOBEDIENCE

As the previous two sections tried to demonstrate, there are two perspectives from which we ought to approach the question of the use of preventive interrogational torture, namely the general policy perspective and the perspective of the catastrophic case. Unlike most absolutists and conditionalists, I suggest that both perspectives ought to be considered as valuable and relevant. We can only focus on one to the exclusion of the other at our peril. However, we must not use the two perspectives simultaneously. Instead, I suggest that the primary perspective ought to be the general one, which, as indicated above, supports an absolute ban on torture due to a combination of moral and pragmatic considerations. Once this general policy is set in place, we should attend to the real problems that are presented by the catastrophic case. But can we really examine preventive interrogational torture from both perspectives and still get a coherent, morally and legally defensible picture? I believe we can.

I peg my belief on the twin notions of *pragmatic absolutism* and *official disobedience*. Section II above dealt with the former, i.e., with the claim that an absolute ban on torture is the right thing to do when we wed moral and pragmatic considerations. What I wish to add to this conclusion now is the argument that the way to reconcile that absolute ban on torture with the necessities of the catastrophic case is not through any means of legal accommodation (e.g., recognizing an explicit legal exception to the ban on torture that applies to catastrophic cases) but rather through a mechanism of extralegal action which I would term *official disobedience*:

in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats *may* entail going outside the legal order, at times even violating otherwise accepted constitutional principles.

Going completely outside the law in appropriate cases preserves, rather than undermines, the rule of law in a way that bending the law to accommodate for catastrophes does not. When great calamities such as those invoked by the truly catastrophic case occur, governments and their agents tend to do whatever is necessary to neutralize the threat, whether legal or not. Yet, to say that governments are going to use preventive interrogational torture in the catastrophic case is not the same as saying that they should be authorized to do so through a priori, ex ante legal rules. It is extremely dangerous to provide for such eventualities and such awesome powers within the framework of the existing legal system because of the large risks of contamination and manipulation of that system and the deleterious message involved in legalizing such actions (e.g., constitutional protections are really designed only for ordinary times and are easily suspended precisely when they are needed the most).

Instead, my proposal calls upon public officials having to deal with the catastrophic case to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions. Those officials must assume the risks involved in acting extralegally. State agents may regard strict obedience to legal authority (e.g., absolute legal ban on torture) irrational or immoral under circumstances of a true catastrophic case. At the same time, such obedience is still to be expected and demanded by the imposer of such authority.[27] If we consider the role of the authority to be filled by society and identify the public

[27] Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 110-14 (1992).

official as the subject of authority, we can understand the possibility of having the latter act outside, and even against, the legal authority in particular cases. Society retains the role of making the final determination whether the actor ought to be punished and rebuked, or rewarded and commended for her actions. It is then up to society as a whole, "the people," to decide how to respond ex post to such extralegal actions. The people may decide to hold the actor to the wrongfulness of her actions. Alternatively, they may act to approve retrospectively her actions.

The people may determine that the use of torture in any given case, even when couched in terms of preventing future catastrophes, is abhorrent, unjustified, and inexcusable. In such a case, the acting official may be called to answer for her actions and make legal and political amends therefor. She may, for example, need to resign her position, face criminal charges or civil suits, or be subjected to impeachment proceedings. Alternatively, the people may approve the actions and ratify them. Such ratification can come in many forms, legal as well as social and political. Thus, for example, legal modes of ratification may include exercising prosecutorial discretion not to bring criminal charges against persons accused of using torture, jury nullification where criminal charges are brought, executive pardoning or clemency where criminal proceedings resulted in conviction, or governmental indemnification of state agents who were found liable for damages to persons who were tortured. In addition, political and social ratification is also possible.

Charles Black apparently once put the matter to his constitutional law class at Yale Law School in the following manner: "[o]nce the torturer extracted the information required . . . . he should at once resign to await trial, pardon, and/or a decoration, as the case might be."[28] While decoration

[28] Quoted in A. Michael Froomkin, *The Metaphor is the Key: Cryptography, The Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 746 (1995).

can establish ex post ratification in appropriate circumstances, there may also be cases where the withholding of decoration sends a strong message of rejection. Michael Walzer, for example, notes the remarkable "national dissociation" by the British from the R.A.F. Bomber Command. The director of the strategic bombing of Germany from February 1942 until the end of the war, Arthur Harris—whose nickname, not at all coincidentally, was "Bomber"—was not, unlike other commanders, rewarded with a peerage. In addition, and perhaps even more tellingly, even though bomber pilots suffered heavy casualties, they are not recorded by name in Westminster Abbey, unlike the case of all other pilots of Fighter Command who died during the war. Walzer describes Harris as having "done what his government thought necessary, but what he had done was ugly, and there seems to have been a conscious decision not to celebrate the exploits of Bomber Command or to honor its leader."[29] The requirement of ex post ratification ensures that public officials are not above the law. Even when acting to advance the public good under circumstances of great necessity, such actors remain answerable to the public for their extralegal actions.

The proposed solution emphasizes an ethic of responsibility not only on the part of public officials but also the general public. Public officials will need to acknowledge openly the nature of their actions and attempt to justify not only their actions but also their undertaking of those actions.[30] Such open acknowledgement and engagement in public justificatory exercise is a critical component in the moral and legal choice made by the acting officials. The public will then need to decide whether to ratify the relevant extralegal actions. In the process of deciding that latter question, each member of the public becomes morally and politically responsible for

[29] MICHAEL WALZER, JUST AND UNJUST WARS 323-25 (3d ed. 2000). But see ROBIN NEILLANDS, THE BOMBER WAR [**xxx**] (2001).

[30] MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 5-12 (1973).

the decision. "[D]ecent men and women, hard-pressed in war, must sometimes do terrible things," writes Michael Walzer, "and then they *themselves* have to look for some way to reaffirm the values they have overthrown."[31] But it is not only the actors themselves who must attempt to find a way to reaffirm fundamental values they have violated in times of great exigency; members of the wider society themselves must also undertake such a project of reaffirmation. Each member of society, in whose name terrible things have been done, must become morally responsible.[32] Such responsibility is assumed by and through the process of ratification or rejection of the particular terrible things that have been done.

The possibility of acting extralegally in catastrophic cases facilitates, in and of itself, an absolute prohibition on torture. Consider, for example, the conundrum in which judges find themselves. Under the proposal advocated above, courts need not be concerned with the prospect of taking an expansive view of constitutional rights coming back to haunt the nation when faced with catastrophic cases, which may necessitate limitations on those rights. The courts need not worry because if the situation is serious enough, there is always the possibility of government officials acting extralegally to protect the nation and its citizens. Hence, the very possibility of extralegal action reduces the pressures for incorporating built-in exceptions to protected rights in general and to limit the scope of the ban on torture, in particular, by way, for example, of definitional hocus pocus "demonstrating" that certain coercive interrogation techniques fall short of "torture" and thus are not subject to the general prohibition.

Furthermore, to acknowledge the *possibility* of extralegal action is not the same thing as accepting willy-nilly limitless powers and authority in the hands of state agents. In a democratic society, where such values as consti-

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[31] WALZER, *supra* note 29, at 325 (emphasis added).

tutionalism, accountability, and individual rights are entrenched and are traditionally respected, we can expect that the public would be circumspect about governmental attempts to justify or excuse illegal actions even if such actions have been taken, arguably, to promote the general good. Moreover, we can and should expect public officials to feel quite uneasy about possible resort to extralegal measures even when such actions are deemed to be for the public's benefit. This feeling of uneasiness would be even more pronounced in nations where the "'constitution is old, observed for a long time, known, respected, and cherished.'"[33] The knowledge that acting in a certain way means acting unlawfully is likely to have a restraining effect on government agents even while the threat of catastrophe persists.

The need to give reasons ex post, i.e., the need to publicly justify or excuse (not merely to explain) one's actions, is a critical ingredient of my proposal. By requiring transparency and publicity, it emphasizes accountability of government agents. The proposed model of official disobedience puts the burden squarely on the shoulders of state agents who must act, sometimes extralegally, without the benefit of legal pre-approval of their actions by, for example, the courts. Public officials have no one to hide behind. They must put themselves in the frontline and act at their own peril. If they believe that the stakes are so high that an extralegal action is merited, they may take such action and must then hope that they are able to convince the public to see things their way. As explained above, the threshold of illegality serves, in and of itself, as a limiting factor against a rush to assume unnecessary powers. Moreover, the need to give reasons for the

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[32] But see Walzer, *supra* note 23, at 67 (suggesting that members of the public may have a right to avoid, if they possibly can, those political or other positions in which they "might be forced to do terrible things").

[33] GUY HOWARD DODGE, BENJAMIN CONSTANT'S PHILOSOPHY OF LIBERALISM: A STUDY IN POLITICS AND RELIGION 101 (1980) (quoting Benjamin Constant).

extralegal conduct may also limit the government's choice of measures ex ante. The commitment to giving reasons, even ex post, adds another layer of limitations on governmental action.[34] Moreover, the public acknowledgment of the nature of emergency actions taken by government may contribute not only to reasoned discourse and dialogue between the government and its domestic constituency, but also between the government and other governments as well as between the government and nongovernmental and international organizations. Thus, the need to give reasons is not confined to the domestic sphere. It also has international implications, both political and legal.

Justice Robert Jackson was therefore right when he suggested that "[t]he chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."[35] At the end of the day, it is those political, moral, and—one may add to the list—legal judgments of the public that serve as the real restraint on public officials. A sense of self-indignation when rules are violated (which is the result of the social, political, and legal ethos of the community), coupled with uncertainty about the chances of ratification, militates against too easy a rush to use extralegal powers.

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[34] *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 656-57 (1995). *See also* Joseph M. Bessette & Jeffrey Tulis, *The Constitution, Politics, and the Presidency*, *in* THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 3, 10 (Joseph M. Bessette & Jeffrey Tulis eds., 1981) (arguing that the need for public justification may influence the choice of political acts).

[35] Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

V. EX POST RATIFICATION

My proposal calls for maintaining an absolute ban on torture while, at the same time, recognizing the possibility (but not certainty) of state agents acting extralegally and seeking ex post ratification of their conduct. The element of ex post ratification is critical to my project.

By separating the issues of action (i.e., preventive interrogational torture) and public ratification, and by ordering them so that ratification follows, rather than precedes, action, the proposed solution adds a significant element of uncertainty to the decision-making calculus of state agents. This "prudent obfuscation"[36] raises both the individual and national costs of pursuing an extralegal course of action and, at the same time, reinforces the general ban on torture. With the need to obtain ex post ratification from the public, the official who decides to use torture undertakes a significant risk because of the uncertain prospects for subsequent public ratification. Perhaps the public would disagree after the fact with the acting official's assessment of the situation and the presumed need to act extralegally. Ratification would be sought ex post, that is when more information about the particular case at hand may be available to the public and possibly after the particular danger (which the use of preventive interrogational torture sought to avert) has been removed and terminated. Under such circumstances, it is possible that calm and rationality, rather than heightened emotions, would govern public discourse, emphasizing further the risk for the official in acting first and only then seeking approval. Of course, the public may also determine that the actions under consideration violated

[36] Dan M. Kahan, *Ignorance of Law is an Excuse-but Only for the Virtuous*, 96 MICH. L. REV. 127, 139-41 (1997) (discussing "prudent obfuscation" as a means to respond to the penal law's persistent incompleteness. Kahan discusses the use of vague terms in criminal laws, giving courts "the flexibility to adapt the law to innovative forms of crime ex post." *Id*. at 139).

values and principles that are too important to be encroached upon as a matter of general principle or in the circumstances of the particular case. The higher the moral and legal interests and values infringed upon, the less certain the actor should be of the probability of securing ratification.

Uncertainty is also important in as much as it reduces the potential risk of under-deterrence that is involved in the possibility of ex post ratification. Such under-deterrence may occur if interrogators have good reasons to believe that ratification will be forthcoming in future cases where preventive interrogational torture is employed.[37] The risk of under-deterrence is the result of what may be called, following Meir Dan-Cohen, conditions of "low acoustic separation."[38] This low level of acoustic separation may be the result of the sophisticated legal mechanisms that are available to interrogators (e.g., legal staff of the relevant security service), the possibility of thinking in advance about possible modes of conduct in future ticking bomb cases (even if without the ability to anticipate in advance all possible features of such cases), and the possible professional and personal links between the interrogators and the service in which they work and other state authorities (e.g., other law enforcement agencies).[39] Significantly, conditions of low acoustic separation create substantial risks of undesirable behavioral side effects on the part of officials, e.g., by allowing decision rules—which recognize the possibility that agents who resort to preventive interrogational torture in catastrophic cases may be let off the hook—affect conduct in specific cases (i.e., state agents resorting to torture, despite the existence of an absolute ban thereon, knowing, or at least having good

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[37] Parry & White, *supra* note 13, at 764-65.

[38] Meir Dan-Cohen, *Decision Rules and Conduct Rules: on Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984), *reprinted in* MEIR DAN-COHEN, HARMFUL THOUGHTS 37 (2002). For further discussion of the concept of acoustic separation in the context of interrogational torture see Miriam Gur-Arye's contribution in this volume. *See also* Dudi Zecharia, *On Torture Chambers and Acoustic Walls*, 10 POLITIKA 61 (2003).

[39] Dan-Cohen, *supra* note 38, at 640.

reason to believe, that they will enjoy immunity against criminal charges and civil claims).[40] However, it ought to be recognized that the uncertainty which is such a critical element of the official disobedience proposal does have similar effects, to some extent, to what Dan-Cohen calls "means of selective transmission."[41] However, whereas the means of selective transmission facilitate the channeling of different sets of norms to different constituencies (i.e., the general public and the authorities), the selectivity in our context works to draw a clear separating divide between conduct and decision rules and minimize the risks of behavioral side effects. The relevant conduct rules are crystal clear: they prohibit absolutely any use of torture, whatever the circumstances. At the same time, the more uncertain the substance and the operation of the decision rules are, and the greater the personal risk involved in reading the substance or the operational status of those decision rules is, the greater the pull on individual actors to conform their conduct to the conduct rules that prohibit torture no matter what.

Indeed, even if we accept that there is a very good chance that ex post ratification will be forthcoming eventually, there are still significant costs attached to acting extralegally. Even if the public ratifies the decision to use preventive interrogational torture in a specific case, there may be personal implications for the officials involved in the decision to apply torture. Such implications emanate, for example, from the fear that ratification will not follow or from the fact that ratification may not be comprehensive and fully corrective (seen from the perspective of the acting agent). Thus, for example, subsequent ratification may shield the actor against criminal charges but not bar victims of torture from obtaining compensation in civil proceed-

[40] *Id*. at 631-32. I should note that my proposal calls for a certain role reversal between public officials and the general public. Under my proposal conduct rules related to the ban on torture will especially target public officials, whereas decision rules would mostly (but not exclusively) target the general public.

[41] *Id*. at 634-36.

ings. Similarly, when ratification assumes the guise of an executive pardon or clemency it wipes the criminal penalty that was imposed on the individual actor, but it may not remove the ordeal of criminal prosecution and the (moral) condemnation that is involved in criminal conviction.[42]

Once we broaden our view to incorporate international, in addition to domestic, legal rules and norms, the costs of acting extralegally are further elevated, introducing additional disincentives to engage in such conduct. Even if the use of torture in any given case is domestically excused ex post, it may be subject to a different judgment on the international plane. This may have significant consequences both for the individual actor (i.e., the interrogator) as well as her government. First, torturers may be subject to criminal and civil proceedings in jurisdictions other than their own, and may also be subject to international criminal prosecution.[43] Second, as noted above, the ban on torture is non-derogable under the major international human rights conventions. As such, no argument of public emergency can justify or excuse a deviation from the prohibition. State agents who engage in acts of preventive interrogational torture implicate their government in violation of the nation's international obligations and expose it to a range of possible remedies under the relevant international legal instruments.[44]

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[42] *See, e.g.*, Leon Sheleff, *On Criminal Homicide and Legal Self Defense*, 6 PLILIM 89, 111-12 (1997). Similarly see Kamisar, *supra* note 20, at 1143-44 (reliance on mitigation of sentence fails to mitigate the "ordeal of a criminal prosecution or the stigma of a conviction.").

[43] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, 1465 U.N.T.S. 112, Articles 4-8; Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), Article 7(1)(f) (defining torture as a crime against humanity).

[44] *See* American Convention on Human Rights, opened for signature Nov. 22, 1969, art. 5(2) & 27(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978); International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, art. 4 & 7, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); and European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3 & 15, 213 U.N.T.S. 221. *See also* Winston P. Nagan & Lucie Atkins, *The International Law of*

Recognizing the possibility of ex post ratification is not the same as authorizing the use of preventive interrogational torture ex ante. Unlike the latter, ex post ratification may serve, at most, as an ad hoc, individualized defense to specific state agents against civil or criminal charges in particular cases. It cannot serve as a general, institutional, conduct-guiding rule to be relied upon ex ante. Subsequent ratification may only be available to individual public officials after the fact, as opposed to setting a priori guidelines for action. Ratification functions as an ex post excuse, rather than justification, of a particular conduct. Like other excuses it serves not as indication of policy goals or as mechanism to guide future behavior by state agents, but rather as "expression[] of compassion for human failings in times of stress."[45] This expression of compassion is particularly significant for what it does *not* imply. An extralegal action, even if followed by subsequent ratification, is unlikely to establish legal precedent for the future. Although the sequence of extralegal action and subsequent public ratification may bring about an eventual change in the law, turning a political precedent into a legal one, such a shift cannot happen under the proposed solution without informed public participation in the process. In addition, because of its individualized nature, it would be hard to generalize ex post ratification into a forward-looking legal norm.

In fact, there is a strong argument that an extralegal action, even if followed by subsequent ratification, does not establish moral precedent for the future. Even those who argue that the moral obligation not to torture is overridable in particular instances do not seem to argue that such an obligation is either cancelled or terminated for all future cases. In other words, such an obligation survives a specific override, which may apply in con-

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Torture: From Universal Proscription to Effective Application and Enforcement, 14 HARV. HUM. RTS. J. 87 (2001).

[45] George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 553 (1972).

crete catastrophic case, and continues to apply to future cases. Furthermore, even in the catastrophic case when such obligation may be overridden it is not cancelled. Using torture, therefore, may be argued to result in a certain degree of moral loss even if we were to consider it legally permissible.[46] Seen from either perspective, a subsequent public ratification does not cancel nor terminate the general duty not to torture.

The individualized, rather than institutional, nature of the subsequent ratification is significant for yet another reason. Institutionalizing interrogational torture reinforces (e.g., conferring imprimatur of legality and legitimacy) social, hierarchical structures that authorize individuals, namely the interrogators, to act violently. As Robert Cover warned in his aptly named *Violence and the Word,* "Persons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously."[47] In such circumstances it is much more likely that resort will be made to violence in interrogations. On the other hand, the need to act extralegally and hope for subsequent ratification focuses on individual behavior. It is not amenable to institutionalization. Interrogation manuals cannot spell it out in great detail. It is left up to the individual interrogator to determine whether to use violence in any given case. Acting at her own peril, the interrogator acts much more as an autonomous moral agent than as an agent for the hierarchical institution which it serves.

VI. TALKING ABOUT TORTURE

[46] *See* Daniel Statman, *The Absoluteness of the Prohibition Against Torture*, 4 MISHPAT UNIMSHAL 161, 190-92 (1997).

[47] Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986), *reprinted in* NARRATIVE, VIOLENCE, AND THE LAW 203, 221 (Martha Minow et al eds. 1992).

In the previous sections I set out the main features of my approach to the conundrum posed by preventive interrogational torture. My proposed solution is based on the twin concepts of pragmatic absolutism and official disobedience. I argue that an absolute ban on torture is the right thing to do when we wed moral and pragmatic considerations. At the same time I suggest that in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats *may* entail going outside the legal order, at times even violating the otherwise entrenched absolute prohibition on torture.

Readers may charge me with trying to have the cake and eat it too, that is supporting an absolute ban on torture precisely on the ground that it is not aimed to function as absolute in real-life. Perhaps this is right. Guido Calabresi notes that subterfuges often accompany our wrestling with tragic choices. "We look for solutions which seek to cover the difficulty and thereby permit us to assert that we are cleaving to both beliefs in conflict."[48] My proposal indeed attempts to cleave to both sets of values that may be involved in assessing torture, in general, and preventive interrogational torture, in particular. However, rather than cover the difficulty I seek to expose it and ensure that it is dealt with in as transparent, open, and public manner as possible.[49]

But is public discourse, in and of itself, desirable in this context? My proposal is made in the context of an intellectual public debate about the permissibility of torture. Mine is one chapter in a book published by one of the leading academic presses and edited by a leading constitutional law scholar. Is it desirable to have such an open debate? Or is it better for the absoluteness of the ban on torture to be treated as axiomatic rather than

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[48] GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 88 (1985).

[49] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 178-81 (1982).

engage in attempts to prove its desirability or usefulness? William Twining once noted (but rejected) that "philosophical analysis of the problem may provide ammunition which could be used or abused by those who seek to justify actions which reflective and reasonable men would condemn without qualification." [50] Henry Shue, who wrote a classic article that is reprinted in this volume, similarly asked, "[I]f practically everyone is opposed to all torture, why bring it up, start people thinking about it, and risk weakening the inhibitions against what is clearly a terrible business?"[51] Although Shue himself referred to such discussions as opening Pandora's Box, such fears, obviously, did not prevent either Twining or Shue from writing valuable contributions to the debate. And we are the better for such articles.

The alternative to no debate over the use of torture (or, indeed, to discussion which merely consists of repeating the mantra that torture is absolutely prohibited) is not the disappearance of the practice of torture. Thus, while we all abhor the medieval detailed codes and procedures on the use of torture, we also ought to recognize that the alternative has not been the elimination of the practice. By not discussing the practice of torture we do not make it go away; we drive it underground. Moreover, by refusing to acknowledge that the notion of torture is more complex than many supporters of the "torture-is-banned-and-that-is-all-there-is-to-it" approach would have us believe, we are running the risk of having the general public perceive the legal system as either utopian or hypocritical. After all, the central premise of this chapter is that most of us—that is, readers of this collection and not only "the great unwashed"—believe that most, if not all, government agents, when faced with a genuinely catastrophic case, are likely to resort to whatever means they can wield—including preventive interroga-

[50] William Twining, *Torture and Philosophy*, 52 ARISTOTELIAN SOC'Y 143 (1978).
[51] Shue, *supra* note 7, at 124

tional torture—in order to overcome the particular grave danger that is involved. And most of us hope they will do so.

The prohibition on torture and the catastrophic case present us with truly tragic choices. Public officials (and, under my proposal, also members of the general public) are asked to choose between several fundamental social values (e.g., the right to be free from torture and the right to life).[52] We may as well make such choices in as informed a manner as possible, taking into account the widest panoply of relevant moral and legal considerations. It is in this context that public debate on torture is critical.

[52] GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17 (1978) ("it is the values accepted by a society as fundamental that mark some choice as tragic.").